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"Reforming EU Governance: The Prospects for Local Authorities"

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1. Introduction:

In 2001 the European Commission released its White Paper on European Governance (the "White Paper"). It was written in response to growing criticism of the way the European Union creates and delivers policy, and of its centralisation of power away from member states and citizens. The purpose of this paper is to consider one particular aspect of European Union ("EU") governance. It examines what the White Paper has to offer local authorities, and investigates whether these offerings meet the expectations of local authorities.

While it is difficult to draw parallels between EU governance developments and those occurring within New Zealand, they will nevertheless be of interest to New Zealand local authorities. This is because local authorities in both Europe, and New Zealand, are confronting very similar issues. In Europe and in New Zealand (indeed internationally) there is a growing demand for greater local authority autonomy to regulate and manage a growing agenda of public affairs, in the interests of local populations i.e., a strengthening of local self-government. In New Zealand this issue is currently being tested out via amendment of the Local Government Act 1974 and the proposed introduction of a "power of general competence". In Europe, the emergence of the White Paper is one opportunity for the local self-government agenda to be pursued.

This paper begins by briefly introducing the White Paper and current EU governance structures relevant to local authorities. It then investigates the

new governance proposals of relevance to local authorities. These proposals are then assessed by comparing them with the aspirations of European local authorities. Finally, some comments are made about the White Paper within the particular context of environmental governance.

2. The 2001 White Paper on European Governance:

The White Paper (released July 2001)¹ begins by acknowledging a growing paradox. On the one hand side people want European institutions to find solutions to major problems confronting societies, including environmental challenges, unemployment, concerns over food safety, crime and regional conflicts. They also want government institutions to maximise opportunities for economic and social advancement. On the other hand, people are increasingly coming to distrust European institutions. In the words of the White Paper:²

"Many people are losing confidence in a poorly understood and complex system to deliver the policies they want. The Union is often seen as remote and at the same time, too intrusive."

These feelings of mistrust, loss of confidence and alienation are linked to tensions and uncertainty about: "...what the Union is, what it aspires to become, about its geographical boundaries, its political objectives and the way these powers are shared with the Member States."³

In response the White Paper launches a number of proposals aimed at decentralisation; to realise that Europe is not just run by European Institutions but by national, regional, and local authorities too - and by civil society. The Paper's clearly stated intention is that this process of decentralisation is not to be achieved through *delegation*, but by opening up the policy making and delivery processes to get more people and organisations involved. There is clear acknowledgement that the Union needs to adopt a less top-down approach to policy and regulation making, and to readdress the use of non-legislative instruments to implement policy.

¹ Commission of the European Communities, European Governance: A White Paper (Brussels, 25.7.2001 COM (2001) 428.

² Supra note 1, at 3.

³ Supra note 1, at 7.

This focus on policy processes is consistent with the Paper's intentionally narrow definition of *governance* as meaning: "rules, processes and behaviour that affect the way in which powers are exercised at the European level...".⁴

More generally, the goals of the White Paper are said to be based on the fundamental principle of "integrating the people of Europe, while fully respecting individual national identities",⁵ and to be unpinned by five core political principles: openness, participation, accountability, effectiveness and coherence. It is anticipated by the Paper that implementation of these five principles will result in "better use" of proportionality and subsidiarity.⁶

But is the White Paper merely concerned with improved policy and regulatory processes without addressing a need for underlying institutional change? It does purport to go beyond process to what it refers to as a "refocusing of Institutions" and adaptation of the way they (the Commission, Council and European Parliament) work. In fact the Paper identifies a refocusing of the Institutions as being "at the heart" of its proposed reform of governance.⁷ The combination of the new policy process proposals and changes to the way Institutions work will, it is hoped, lead to:

- more targeted use by the Commission of its right of initiative;
- EU legislation stripped back to its essential principles and frameworks for implementation developed by the Commission; and
- more effective involvement of national actors in the shaping, application and enforcement of Community rules and programmes.⁸

Of course, reforming Union institutions and processes is an ambitious and notoriously difficult undertaking, so how does the White Paper intend to achieve these objectives? As if in anticipation of criticism, the Paper sets itself very modest goals in this respect. It points out that there are limits to what the Commission can achieve and that all other Union actors (including civil society and current and future Member States) share responsibility for

⁴ Supra note 1, at note 1.

⁵ Supra note 1, at 32.

⁶ Supra note 1, at 32.

⁷ Supra note 1, at 33.

⁸ Supra note 1, at 34.

bringing about the changes advocated.⁹ Rather predictably it also reinforces the basic Community method which separates the powers and functions of the Commission, the Council and the European Parliament.¹⁰ Finally, and most importantly, the Paper makes it clear that implementation of the proposals does *not* require new Treaties or changes to existing Treaties; "it [implementation] is first and foremost a question of political will".¹¹ Thus it is clear that little can be expected, in the form of progressive innovation or fundamental change, from this particular White Paper on Governance.

The final section of the Paper, entitled "From Governance to the Future of Europe", does however, offer something more interesting. It posits that the reforms it advocates will lead the Union toward future Treaty changes at the next Inter-Governmental Conference.¹²

It is at this point that the White Paper moves beyond its narrow definition of governance, as being about processes, to recognition that governance is also about competence or power. It speaks of reinvigoration of the Community method, and of constitutional changes and future political organisation:

- to clarify the division of powers between the legislature (Council and Parliament) and the executive (Commission); and

- to develop clear principles identifying how competence is shared between the Union and Member States.

The final paragraphs of the White Paper speak of building the Union upon a *multi-level system of governance*, in which Community actor contributes. It goes on to state that: "In a *multi-level system [of governance]* the real challenge is establishing clear rules for how competence is shared - not separated; only that non-exclusive vision can secure the best interests of all the Member States and all the Union's citizens."¹³

⁹ Supra note 1, at 3.

¹⁰ Supra note 1, at 8.

¹¹ Supra note 1, at 33.

¹² Scheduled to take place in Laeken 2004.

¹³ Supra note 1, at 35 (emphasis added). Note however that full implementation of this model would require treaty changes. The White Paper's model for the Union's future political organisation also moots clarification the powers of executive and legislature. eg; sharing of legislative power, in some areas, between Parliament and the Council and assumption by the Commission of full executive responsibility, supra note 1, at 34.

3. Local Authorities in the European Union:

3.1 The Role of Local Authorities within the European Union:

What is the current role of local authorities in the EU and how do they participate in EU governance?

The Committee of the Regions ("CoR") is the primary institutional organ through which local authorities contribute to EU governance. It was established as recently as 1994 to enable the public to be represented at the European level, via local and regional authorities. The CoR comprises 222 members, all of whom are elected representatives within their own regions and localities. It is a structural acknowledgement of the concept of subsidiarity.¹⁴

The CoR must be consulted, as a matter of course, on all areas likely to impact on localities and regions. In 1994 the CoR's responsibilities were limited to five areas: economic and social cohesion, trans-European infrastructure networks, health, education and culture. As of May 1999, another five areas of compulsory consultation were added by the Treaty of Amsterdam; employment policy, social policy, the environment, vocational training and transport.

In law and in practice, the role of the CoR is greatly constrained. For example, its right to be consulted is only triggered by Commission or Council initiatives, such as the submission of a proposal or communication, for CoR's consideration. In response, the CoR may issue an opinion. Thus "consultation" with the CoR is, in reality, a very limited paper exchange exercise. The CoR may also issue resolutions on topical political issues and studies, but these do not have legal status; other institutions are not required to consider them. In the context of environmental issues, a recent text noted that the "opinions of [the CoR] in environmental matters have not yet reached the point of having any significant influence on the content of Community directives or regulations."¹⁵ Clearly the CoR governance role is limited to one of qualified participation in consultative processes and falls a

¹⁴ Both are a product of the Maastricht Treaty 1991.

¹⁵ Ludwig Kraemer, *EC Environmental Law*, 34.

long way short of an effective share in competence or power. Thus it can be said that its political status is weak.

The CoR is not the only means by which local authorities are able, at least in theory, to influence EU policy and law. It is the official view of the Union that national governments should be fully informed of the interests of local government within their jurisdiction and where appropriate, be feeding these interests into their overall approach to EU issues. The extent to which this actually happens is often disputed, and depends greatly on the relationships and the formal and informal means of communication and dialogue between local authorities and national governments.¹⁶

While the CoR is the primary organ for local authority involvement in EU processes, it is not the only body through which local authorities can attempt to influence EU law and policy, or pursue independent (from central government) local, regional or national agendas. Other key institutions, include:

- the Congress of Local and Regional Authorities of Europe ("CLRAE");¹⁷
- Council of European Municipalities and Regions ("CEMR");¹⁸
- International Union of Local Authorities ("IULA"); and¹⁹
- International Council of Local Environment Initiatives ("ICLEI").²⁰

Co-ordination between these groups, on key issues of governance is growing, perhaps thereby increasing the ability of local authorities to bring about the changes they are advocating.

3.2 Growing Dissatisfaction:

As previously mentioned, there is growing dissatisfaction with EU governance among Europeans. These feelings of dissatisfaction are shared

¹⁶ See below notes 31 and 32, together with accompanying text.

¹⁷ The Congress of Local and Regional Authorities of Europe (CLRAE) was established in 1994 and is a consultative body to the Council of Europe.

¹⁸ Established in [].....

¹⁹ Established in [].....

²⁰ Established in []

by local authorities. They are, in part, a consequence of EU enlargement (currently 15 member states, with several applying for membership)²¹ and an increase in the range of matters within the competence of the EU (from creating an internal market to matters of foreign policy, defense and environmental protection). The prospect of the EU going "broader and deeper" has compounded pre-existing feelings that governance is too centralised, that Europe is controlled by EU Institutions. This has resulted in feelings of alienation, mistrust and disinterest. It has also caused Europeans to identify more strongly with their home regions or towns, resulting in a desire for greater regional autonomy or self-governance.

This closer identification with home regions or towns, fueled by concerns about EU governance, adds impetus to the pre-existing local democracy or self-governance movement which this paper describes below.

3.2.1 the local-self governance movement:

Within Europe, the democratic ideal of the right of citizens to participate in the conduct of public affairs has long been recognised. It has also been acknowledged that it is at the local level that this right can be most directly exercised and that local authorities (which facilitate the exercise of this right) are one of the main foundations of any democratic regime. In short, the concept of local self-government is one of Europe's pillars of democracy. It is also an important contribution to the principle of decentralisation of power.²²

However, the sharing of this democratic ideal amongst European states is not considered enough to safeguard it from the compromising actions of national governments. Hence local government circles pushed for the protection and strengthening of local self-government, through a set of commitments binding European states. In 1985 the European Charter of Local Self-Government emerged as the first multi-lateral legal instrument to define and safeguard local autonomy.²³ The Charter requires constitutional or legislative recognition of the principle of local self-government.²⁴ It

²¹ Enlargement of the EU from 15 to 28 or more countries will bring with it around 170 million more inhabitants and a 58% increase in land area.

²² **Preamble of Convention/charter?**

²³ **explanatory , page 3?**

²⁴ 1985 European Charter of Local Self-Government ("Charter"), article 2.

defines local self-government as:²⁵ "...the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility [not acting as agents] and in the interests of the local population." The Charter does not, however, attempt to delineate what constitutes a "substantial share of public affairs."

Other articles deal with the nature of local government powers. Article 4(6) is of particular interest as it deals with *consultation on matters that are outside the scope of their authority, but by which they are particularly affected*. It provides that the manner and timing of consultation should give local authorities a real possibility to exercise influence. Consultation should take place directly with the authority or authorities concerned or through their associations where several are involved.²⁶

More recently, the values of local democracy and decentralisation are being promoted by local government associations, and others, at the international level. In the late 1990s a draft World Charter of Local Government (modeled on the European Charter) emerged. At present it is primarily linked to implementation of the Habitat Agenda, recognising that strong local authorities and effective decentralisation will be important to meeting the challenges facing human settlement.²⁷ The Draft World Charter currently lacks sufficient support at the international level for it to become a legal instrument.²⁸ However, within the Council of Europe, it has attracted support.²⁹

The European Charter has largely been the creation of the Council of Europe. This is due, in part, to the fact that the Council has long recognised

²⁵ Charter, article 3. **bit in [] comes from the explanatoray notes....las should not be limited to merely acting as agents of higher authorities, page 4.**

²⁶ See the explanatory note to Charter Article 4(6), **page 6**. "Local authorities shall be consulted, in so far as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly."???

²⁷ **Rearter stuff.fr to UN Commission on Human Settlements statement, attached to other world ch.** A European Council recommendation refers to the World Charter as an "universal legal instrument aimed at contributing to sustainable development of local authorities and, if adopted, will no doubt contribute to strengthening citizen's participation in the decision making process at local level, placing local economic development on a sounder footing and improving social cohesion in cities and regions all over the world."
(14)?

²⁸ The Executive Director of the Committee of Permanent Representatives has been given the task to ensure that dialogue on the strengthening of local authorities and decentralisation intensifys and continues.

²⁹ **8th Plen session of the Council of Ministers (page 4).**

the importance of local authority representation.³⁰ The Congress of Local and Regional Authorities of Europe (CLRAE) is the consultative body of the European Council which represents some 200,000 local and regional authorities, and which is tasked with promoting and ensuring local democracy. It is also tasked with the new role of representing local government interests in the shaping of European Union policy.

Perhaps more interesting is the work of the European Council's Steering Committee on Local and Regional Democracy ("CDLR"), which is a forum of member state representatives, responsible to the Council for activities which strengthen local democracy. One of its current ongoing activities is an investigation into *institutional dialogue* between states and local government, recognising that this is a mainspring of decentralisation. It is studying the different forms that this dialogue takes (political or financial negotiations, information, consultation, co-ordination systems, etc) and the mechanisms that exist to ensure regular or permanent dialogue. It also intends to study the impact of this dialogue on local democracy, decisions concerning the state's political and economic objectives, legislation and national policy implementation.³¹ Unfortunately, the results of this study are not yet available.³² When complete, it may provide some interesting information (i.e., examples of both good and bad practice) regarding the essentials of real and effective dialogue between the State and local government. It may also cast some light on the extent to which Member States are acting, at an EU level, in a manner that takes into account the interests and concerns of local authorities, or whether their agendas are determined by purely 'national' interests.

It can generally be said that the interests of local government are being more effectively acknowledged and pursued within the auspices of the European Council than the European Union. As noted above, the political status of the CoR is still weak and the consultation process is some what of a narrow one way street. However, the progress made by the European Council will have an impact on the Union. As already noted, the Council, via its various organs, contributes to Union policy development. Furthermore, with enlargement of the Union, the two bodies will soon share a more common

³⁰ In 1957 a representative body known as the Standing Conference of Local and Regional Authorities of Europe was created. As of 1994 it became the Congress of Local and Regional Authorities of Europe.

³¹ ref to website info

³² ref to correspondence, any more ??

membership.³³ The work and views of the European Council will also feed into and have an impact at the international level. A key example is its support of the Draft World Charter. This influence will create the opportunity, for greater recognition of local government interests, by national governments and by the international community of states.

Discussion and debate about globalisation are also highly relevant to the self-governance movement. As James Rosenau put it, the twin dynamic of globalization is localization:³⁴

"...simultaneous tendencies towards globalization and localization, towards more extensive integration across national boundaries and more pervasive fragmentation within national boundaries, towards a relocation of authority "upward" to transnational entities and "downward" to subnational groups. Not only do these counterpressures occur simultaneously, they are also interactive, as if virtually every increment of globalization gives rise to a comparable increment of localization, and vice versa."

Thus, as states accept shifts of authority to transnational entities, and the legal personality of other players develops, the range of issues over which states can claim exclusive competence narrows. Similarly, at the national level, the demands of non-state political entities (and others) for more autonomy over local social, economic and environmental development and emergence of stronger local democracy, will also narrow the range of issues over which states can claim exclusive competence. As local autonomy becomes stronger, the ability of the state to claim exclusive authority and the loyalty of citizens becomes questionable. Combined, the dynamics of globalisation and localisation create interactive internal and external challenges to the sovereignty of states. With this context in mind, it would be a mistake to dismiss the local self-governance charters as being of little real significance of the future of EU governance.

3.2.2 the sustainable development agenda:

As described above, the local self-governance movement creates an important challenge for existing EU governance, but the sustainable

³³ Council of Europe currently has 42 member states, and the EU 15. EU enlargement will add several more in the foreseeable future.

³⁴ page 272. Hobe refers to it as denationalisation.

development agenda creates an even greater challenge. It has the potential to dramatically change what is within the scope of local government authority; it has the potential to greatly *expand the scope of their competence*. This is because sustainable development reasons that the necessary integration of economic, social and environmental matters is best achieved by communities acting at the local level.

At the international level, local authorities are already well organised in their support of sustainable development which is supportive of and responsive to, local and regional initiatives. The International Council for Local Environmental Initiatives ("ICELI") provides a good example. It was established in 1990 to be an environmental agency for local governments. Its stated mission is to: "build and serve a worldwide movement of local governments to achieve tangible improvements in global environmental and sustainable development conditions through cumulative local actions." Its current membership comprises some 350 cities, towns, counties and associations, from over 50 countries. Hundreds of other local governments are engaged in ICELI projects and campaigns.

ICELI has a strongly defined advocacy role. It intends to be a substantial local government voice in regional and international deliberations on sustainable development and to use its representative role to build policy that is supportive and responsive to local-level initiatives. Some examples of its advocacy at work include:

- sending delegations to, and preparing background reports for, a number of United Nations Commission for Sustainable Development sessions ("UNCSD"); and

- sending delegations to, and preparing reports for, several Conference of the Parties meetings on the United Nations Framework Convention on Climate Change.

Its advocacy role is supported and enhanced by its consultative status at the United Nations, and its relationship to the IULA.³⁵ It has also developed a partnership with the United Nations Centre for Human Settlements ("UNCHS") and the United Nations Environment Programme ("UNEP"), through which it intends to link the global programmes of these international

³⁵It is the implementation agent for IULA environmental activities and sustainable development.

organisations with local government actions and interests. Its partnership with the UNCHS links it with governance issues including the development of a World Charter of Local Government, mentioned above.

Returning to the European level, growing concerns about: (i) the lack of integration of environmental considerations into related policy areas;³⁶ and (ii) recent acknowledgement that the EU must make better progress (via a sustainable development strategy) on implementing sustainability,³⁷ have also lead to ongoing debates about the weaknesses of EU governance structures. All these matters have given local authorities opportunity to be critical of EU governance and have created opportunities for them to push for greater decentralisation and more autonomy.

Furthermore, the principles of subsidiarity and its companion principle, proportionality (E.C. Treaty, Article 5)³⁸, are particularly important in the environmental context and are an acknowledgement of the need to avoid centralisation and over-regulation. The exact meaning of both these principles is the subject of debate, but the Commission has defined them as follows:³⁹

"[f]rom the conception of policy to its implementation, the choice of the level at which action is taken (from the EU to local) and the selection of the instruments used must be in proportion to the objectives pursued. ..."

Both these principles provide local government with an important legal vehicle (via E.C. Treaty, Article 5), by which to argue for increased competence.

With this all in mind, the next section of this paper examines exactly what the White Paper offers local authorities. However, before doing so, brief reference is made to the recent acknowledgement in New Zealand of the link between local authority competence and sustainable development.

³⁶ This is the focus of the Cardiff Process which was initiated by the Council of Ministers in 1998. **For an assessment of EU integration policies see: []**

³⁷ **ref to SDS?????**

³⁸ [.....]

³⁹ This quote continues: "This means that before launching an initiative, it is essential to check systematically (a) if public action is really necessary, (b) if the European level is the most appropriate one, and (c) if the measures chosen are proportionate to those objectives.", supra note 1, at 10-11.

3.2.3 developments in New Zealand:

As mentioned in the introduction to this paper, New Zealand is also experiencing a growing demand for greater local autonomy to regulate and manage an expanding agenda of public affairs, in the interests of local populations. This demand has recently come to fruition in the form of a proposal to amend the Local Government Act 1974. The current Local Government Bill intends to radically amend the 1974 Act by (inter alia) providing local authorities with a new statement of purpose and by granting them a power of general competence.

The purpose of local authorities is stated to be:⁴⁰

"to enable local decision-making, by, and on behalf of, individuals in their communities, to democratically promote and action their social, economic, environmental, and cultural well-being in the present and for the future."

This wording comes very close to a statement of "sustainable development" without explicit mention of the concept.⁴¹ In order to fulfill this broad statement of purpose, the Bill gives local authorities full capacity, rights and privileges to undertake activities. This is referred to as a 'power of general competence' as local authorities have been granted the same rights and freedoms as individuals and corporations.⁴² This new power of general competence releases them from their pre-existing status as statutory entities with a very specific, but limited and prescriptive mandate.

Naturally, there has been a lot of discussion about the new purpose and power and whether genuine advances in local autonomy, and the status of local authorities, will be achieved.⁴³ However, the point of interest for this paper is the fact that Bill has linked the sustainable development agenda and its corollary; the need for expanded local authority competence.

⁴⁰ Local Government Bill [], clause 8.

⁴¹The explanatory note to the Bill does refer to the promotion of *sustainable* social, economic, environmental and cultural well-being.

⁴² Clause 9(2): "For the purposes of performing its purpose, a local authority has-(a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and (b) for the purposes of paragraph (a) full rights, powers, and privileges." Clause 9(4): "Subsection (2) is subject to this Act and any other enactment or rule of law."

⁴³ []

4. White Paper Proposals:

As discussed above, the White Paper makes a number of proposals for opening up the policy making process and implementing principles of good governance.⁴⁴ Those of most significance to this paper give greater acknowledgement to the importance of local government in European policy making and to their status as elected representatives.⁴⁵

These proposals include:

(i) a more systematic dialogue with European and national associations of regional and local government at an early stage of policy making;⁴⁶

(ii) exploration of more flexible means for implementing EU law and policy, while maintaining policy coherence. The CoR is to review the regional/local impact of EU Directives, and report on possibilities for more flexible means of application;⁴⁷

(iii) reinforcing a culture of systemic (as opposed to ad hoc) consultation and dialogue by the adoption of a *code of conduct* that sets out minimum standards for consultation (what, when, whom and how). In some policy sectors the Commission will also develop extensive partnership arrangements, involving commitment toward additional consultations beyond the minimum standards; and⁴⁸

(iv) examination of how the framework for trans-national co-operation of regional and local actors could be better supported at EU level.⁴⁹

⁴⁴ The White Paper describes five principles of good governance: openness, participation, accountability, effectiveness and coherence. Supra note 1, at 10.

⁴⁵ This is not the task of the EU alone. National governments must also play their part by involving local government in the preparation of national positions on EU policies.

⁴⁶ Supra note 1, at 12-13. The White Paper also suggests that the CoR takes on a more proactive role by preparing exploratory reports on policy, in advance of Commission proposals. Note however, without a change in attitude of the Commission, not much will be achieved. At present the Commission tends to develop policy and then "defend" throughout consultation with various fora. **..cite Kraemer... text of EU law.**

⁴⁷ For example; tripartite target-based contracts between the Commission, Member States and designated local government. Supra note 1, at 13.

⁴⁸ Supra note 1, at 17.

⁴⁹ Supra note 1, at 18.

It is the White Paper's intention that these proposals, and others, will move the EU away from the linear model of dispensing policies from above, toward a "virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels."⁵⁰

Clearly these proposals fit well with the White Paper's definition of "governance" as meaning: "rules, processes and behaviour that affect the way in which powers are exercised at the European level..". At their core is a beefing up of participatory processes, particularly 'consultation', and little more. However, as already mentioned, it is the final section of the Paper, entitled "From Governance to the Future of Europe" that potentially offers local authorities the prospect of something more interesting.

This section of the White Paper⁵¹ suggests a process leading toward future constitutional changes and future political organisation for the purpose of (i) clarifying the division of powers between the legislature and the executive, and (ii) developing principles for a *multi-level system of governance in which competence is shared*. Here the White Paper has expanded its notion of 'governance' from one of process, to include competence or power, without a discussion of what is meant by 'competence'.

'Competence' is generally understood to mean legal capacity, power or authority. It may include the power to legislate either individually or in a shared sense, or it may be limited to the power to make policy. But, who will competence be shared between, what will the scope of these competences be, who will exercise them and when? These issues are not discussed in the Paper. However, it is relatively clear that the Commission conceives the multi-level system of shared governance as primarily comprising the Commission and the Member States. It does not suggest that other "actors" join this club, in particular, it does not mention local government in this context. However, as will be seen below, this has not prevented local authorities from advocating exactly this.

5. The Response of Local Authorities:

⁵⁰ Supra note 1, at 11.

⁵¹ Supra note 1, at 32-35.

What has been the response of local authorities, to the White Paper proposals? By and large they have been supportive, but there are also a number of fundamental criticisms.

The CoR has gone to the heart of the matter of fundamental competences in a multi-level system of governance. First, as noted above, the Paper suggests the possibility of Treaty changes to clarify these competences. As a consequence these issues may become the subject of a "convention" (discussion) which could culminate at the next Intergovernmental Conference in 2004 where Treaty changes would be announced. The CoR has stated its position clearly; it wants to be a full and formal partner in the "convention". Previously it has held only observer status which has not enabled it to exert much influence on outcomes. Obviously the CoR hopes that by becoming a full and formal partner in the convention, it will be able to influence constitutional discussions in its favour.

Second, the CoR has stated that it considers it necessary to avoid confusing: "...the democratic legitimacy of elected representatives with the need for a more participatory democracy through greater involvement of NGOs and civil society."⁵² Consequently, its participation in the "convention" ought to be as a full member and not as part of the Civil Society Forum for NGOs and civil society.

The CoR is making an important argument here. In the context of the EU generally, and past "conferences", it has been lumped together with civil society and NGO's and given a limited participatory status on a par with that given to NGOs. The White Paper's proposals merely attempt to improve the processes of participatory democracy. However, as the CoR has pointed out, local government is fundamentally different from civil society and NGOs; they are democratically elected political representatives of citizens. As such, they are entitled to more than participatory status. They are entitled to a status which enables them to share in fundamental competences.

Third, it is the objective of the CoR that Treaty changes be made to give it "full institutional status", establishing its right to institute proceedings, and giving it powers that go well beyond a purely consultative role. The CoR is hoping that the eventual adoption of a *European Constitution* will be the

⁵² COR/01/9601.en Brussels, September 21, 2001.

vehicle by which its full institutional status could be recognised and secured.⁵³ Certainly the prospect of a European Constitution would provide the CoR with a valuable opportunity to renegotiate its institutional status.

Furthermore, the CoR wants its political role to be recognised and to this end argues against a second chamber for the EU Parliament. Rather it argues that any new institution should be filled with representatives of regional and local authorities and should be evolved from the CoR.⁵⁴

All in all, the White Paper has not offered local government anything like what they want i.e., a share in EU competence via its own institution. However, the Paper's acknowledgement of the need to reform governance has provided the CoR with an important ongoing opportunity to build up its influence regarding key principles such as proportionality, subsidiarity, and grass-roots representation, and promote its own understanding of new forms of governance.

As evidence of exactly this occurring, it is useful to refer to a speech made by the Director of the UK Local Government International Bureau, before a European Commission public hearing, held shortly before the release of the White Paper. From the outset he declared his position in the following terms:⁵⁵

"I represent local government, which in our view is a sphere of government of equal weight and importance as a sector, to European, national and regional government. We say *sphere* of government, because we believe the language of *levels* of government represents and old-fashioned hierarchical view, in which higher equals more important."

He went on to argue in favour of a system in which *all spheres* of government (including local government) share responsibility in the exercise of most competences and to advocate for clarity regarding the

⁵³ The EU does not have a constitution in the sense of one written document, rather fundamental competences are found in a number of constituting treaties.

⁵⁴ UPC/3529en Brussels, 5 April 2001.

⁵⁵ Speech by Jeremy Smith, Director, Local Government International Bureau, "European Governance: Moving Towards a Better Use of Subsidiarity and Proportionality", delivered to a European Commission public hearing on Governance in Brussels, 16 March 2001, emphasis original. <www.ccre.org/gouvernance/speech-js-gov_an.html>.

scope of competences. On the important issue of who acts when, he argued strongly in favour of a clear definition of subsidiarity:⁵⁶

"The true meaning of subsidiarity involves decisions being taken by the sphere of government nearest to the citizen that is effective for the purpose in question. Local and regional government (in all its forms) are the crucial spheres of government for many, many purposes. The distribution of competences between the EU and Member States will fail in its purpose unless this essential truth is understood and put into practice."

Obviously there is a long way to go before local government will be recognised as a sphere of government of equal weight and importance to European and national government, with a key role to play in developing EU policy and law.⁵⁷ Currently only States can be members of the EU and unless and until this changes, there will be serious and fundamental constitutional limits to the aspirations of local government. But statements, such as that made in Article 1 of the current Treaty on the European Union, which refers to an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible, and as closely as possible to the citizen, give local government a significant opportunity to pursue its agenda. Local government is, after all, the sphere of elected government closest to citizens.

6. Environmental Governance

As discussed above, developments in the environmental sector are also creating pressure for more radical reform of the EU's governance structure. This is particularly so within the context of the creation and implementation of an EU sustainable development strategy.

In June 2001 the European Council finally adopted the EU's first sustainable development strategy. In the words of this strategy ("SDS"):⁵⁸

⁵⁶ Supra note 55.

⁵⁷ The **Consultative Forum** suggested that the CoR be developed as the body providing for participation of local government in the process of community legislation, and that consultation of local government representatives occur in a hearing to be held by the Commission at an early stage of drafting legislative proposals., **sustainable governance paper, page 11.**

⁵⁸ [reference] pge 2.

"Sustainable development offers the European Union a positive long-term vision of a society that is more prosperous and more just, and which promises a cleaner, safer, healthier environment - a society which delivers a better quality of life for us, for our children, and for our grandchildren. Achieving this in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance, and that environmental policy is cost-effective."

The EU SDS was developed by the Commission and seems, rather surprisingly given the Commission's simultaneous writing of the White Paper on Governance, to have been the subject of little consultation.⁵⁹

From an internal community point of view, the SDS is seen as an important fulfillment of the objective of Article 2 of the Amsterdam Treaty, and a very important EU contribution to the forthcoming Rio +10 conference. The SDS also represents an important link between the Cardiff Process of environmental integration across all policy sectors, and earlier integration processes which focused on social and economic policies.⁶⁰

As regards governance issues, the EU SDS provides an important opportunity to consider and improve governance issues. As two recent papers by the European Consultative Forum on Environment and Sustainable Development⁶¹ have put it, the SDS is a test case for good governance. In the opinion of this Consultative Forum, given the special opportunity that environmental sustainability issues offer for advancing governance schemes,⁶² the SDS should be seen as a chance for the Commission to demonstrate its willingness to encourage new forms of multi-level governance and provide a concrete manifestation of the EU's good governance objectives.⁶³ To this end, two Consultative Forum papers have suggested that there needs to be greater political integration between all

⁵⁹ The introduction to the EU SDS claims that it builds on the Commission's March consultation paper and on the many responses to that consultation paper. But the Commission's own Consultative Forum contradicts this by stating that despite encouragement to comment, the ability to do so was limited by the fact that very little written material on the EU SDS was provided. **See Foreword of Chair, 30 October 2000.**

⁶⁰ Integration of social and economic policies were the focus of earlier Luxemborg and Lisbon Council meetings.

⁶¹ refs to 2 papers.

⁶² pag 8 pf good gov paper

⁶³ page 8 of good gov paper and page 5 of April paper

levels of government; local, national and EU which could, in part, be achieved by enabling local government to fully participate in EU legislative processes.⁶⁴ More specifically the Forum has suggested that the CoR be developed as the body providing for participation of local government in the process of community legislation, and that consultation of local government representatives occur in a hearing to be held by the Commission at an early stage of drafting legislative proposals.⁶⁵

However, the reality is that the SDS stops well short of any changes to governance. It provides only weak reference to "wide-ranging consultation of stakeholders" and to the notion of two-yearly stakeholder forums to assess the SDS.⁶⁶ This is obviously a long way short of new forms of multi-level governance. It would seem then, that both the White Paper and the SDS are out of step with the debate on new forms of environmental governance. However, as noted above in the discussion on the White Paper, the 2004 Intergovernmental Conference may be the forum where real decisions on changing the competences of EU institutions will be made. Between now and 2004 it is likely that pressure for change will greatly increase because of the particular opportunities and challenges that sustainable development offers.

As the White Paper acknowledges, its internal reform of governance has international ramifications for developments in global governance. It notes that EU ideals and objectives (such as social justice) need to be pursued outside the EU for them to be effectively attained internally and internationally. In this respect the Commission makes a number of proposals, including:

- (i) improving dialogue with governmental and non-governmental actors from outside the Union (which is said to already be part of its sustainable development strategy);⁶⁷
- (ii) promoting implementation of new tools at the global level, to complement "hard" international law; and

⁶⁴ x ref? see detailin the sustian gove paper.

⁶⁵ sust gov paper, page 11.

⁶⁶ page 8 and 15.

⁶⁷ Supra note 1, at 26.

(iii) promoting discussion on comprehensive reform of multi-lateral institutions (to address effectiveness and legitimacy of rulemaking) and improve co-operation and openness of international organisations.⁶⁸

Of course, *global* environmental governance issues and developments will also have an impact on EU governance structures, and some of these developments may well help to push the EU toward greater recognition of the political authority of local government. For example, within the context of the environment it is well accepted that states acting either alone or together, can not, without the assistance of other social and political actors, effectively address many global environmental challenges such as climate change, loss of biodiversity, marine pollution, trade in endangered species, deforestation and desertification (to name but a few). It is for this reason that the role and function of local government, NGOs and civil society have increasingly been acknowledged and facilitated by documents such as Agenda 21 and the Habitat Agenda. But here in lies the dilemma; how should this new form of participation in the international legal system be reconciled with the traditional paradigm that states are the *only source of authority and subjects of international law*?

It is this dilemma that gives rise to the debate about the emerging or existing legal personality of non-state entities such as local authorities. Realists and neo-realists would argue that the still limited rights of participation, such as observer status, pose no real internal or external challenge to the sovereignty of states and therefore to traditional concepts of global governance.⁶⁹ However other commentators, via a range of arguments, maintain that non-state entities have acquired a degree of legal personality or a limited subject status, and therefore do pose an internal and external threat to state sovereignty and require a new theory of global governance in which states must, to some degree, share authority to govern with others.⁷⁰

7. Conclusion:

What then are the prospects for local authorities and their aspirations for a share in EU governance?

⁶⁸ Supra note 1, at 26-27.

⁶⁹ Rosenau, supra note [], at [].

⁷⁰ egs

The White Paper does not, on the face of it, offer local authorities much in the way of change. However, it does represent an important acknowledgement that reform of governance is required, and it will potentially lead to the discussion of constitutional issues in preparation for the 2004 Intergovernmental Conference. Furthermore, the White Paper does not exist in a vacuum. Other developments, both within and outside the EU have the potential to exert subtle but steady pressure for change. In particular, it will be interesting to see whether the forthcoming Rio + 10 discussions on sustainable development, and implementation of Agenda 21, will lead to an empowerment of local authorities. In the longer term, it will also be interesting to see what influence the growing civil society movement will have on calls to reform global governance structures. Obviously any major inroads into the sovereign authority of the state, at the international level, will have an impact at the EU level.

Finally, the most obvious question must be asked; is the EU capable of achieving major reform of its governance structures? Will the vested interests of existing institutions such as the EU Commission prevent this? While any attempt, at this stage, to answer these questions can be little more than speculation, one thing is certain; the citizens of the Union are more than capable of making their own judgements about how well their interests are represented and of making their sentiments known to Member State politicians and EU officials. As the White Paper itself acknowledges, the Irish "no" vote, a few years ago, highlighted the extent to which the Union had fallen from favour. Ultimately, the Union's future support, relevance, and ability to respond to the large challenges which face human society, will depend on its ability to honour the very first article of the current Treaty on European Union, which refers to a union among the peoples of Europe in which decisions are taken as closely as possible to the citizen. As local government is the sphere of government closest to the citizen, the EU should be listening closely to their political aspirations.

The Commission speaks of the need for a "non-exclusive vision" of how competence should be shared,⁷¹ but this paper has suggested that it also needs a new vision of *who* it is that shares in these competences.

⁷¹ *Supra* note 1, at [].

